

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

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|-----------------------------------|---|---------------------|
| WILLETS POINT ASPHALT CORPORATION |) | |
| |) | |
| |) | |
| Employer |) | |
| and |) | |
| |) | |
| NESTOR SECAIRA, AN INDIVIDUAL |) | Case No. 29-RD-1124 |
| |) | |
| Petitioner |) | |
| |) | |
| and |) | |
| |) | |
| |) | |
| LOCAL 175, UNITED PLANT AND |) | |
| PRODUCTION WORKERS |) | |
| |) | |
| Union |) | |
| |) | |

SUPPLEMENTAL DECISION ON OBJECTIONS AND NOTICE OF HEARING

Upon a petition filed on December 15, 2008,¹ by Nestor Secaira, an Individual, herein called the Petitioner, and pursuant to a Decision and Direction of Election issued by the undersigned on December 29, and upon which Local 175, United Plant and Production Workers, herein called Local 175 or Union, intervened based on its collective bargaining relationship with Willets Point Asphalt Corporation, herein called the Employer, an election by secret ballot was conducted on January 23, 2009, among the employees employed in the following unit:

All full-time and regular part-time asphalt plant workers, including laborers, mixers, burners, maintenance employees, maintenance helpers and asphalt strippers employed by the Employer at its facility located at 32-02 College

¹ All dates hereinafter are 2008, unless otherwise indicated.

Point Boulevard, Flushing, New York, but excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

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| Approximate number of eligible voters | 8 |
| Number of void ballots | 0 |
| Number of ballots cast for the Union | 1 |
| Number of votes cast against participating labor organization | 5 |
| Number of valid votes counted | 6 |
| Number of challenged ballots | 1 |
| Number of valid votes counted plus challenged ballots | 7 |

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has not been cast for the Union.

The Union filed a timely objection to conduct affecting the results of the election. The Union's objection is attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned Union's objection, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

The Objection

In its objection, the Union asserts that the Employer provided the Union with an inadequate Excelsior² list prior to the election. The Excelsior list provided by the Employer

² Excelsior Underwear, 156 NLRB 1236 (1966).

contained eight names. The Union asserts that five names were omitted from this list. The Employer asserts that this objection is without merit. The Petitioner has not taken a position on this objection.

In its offer of proof, the Union states that Fred Clemenza, an organizer with the Union, will testify that during the last six months, he has personally observed Ray Ortiz, Chris, Domingo, Wakeen, and Philippe (last names unknown) performing bargaining unit work. These individual's names did not appear on the Excelsior list provided by the Employer.

The Employer maintains that Ray Ortiz is an office worker who performs some asphalt testing, but he is not an asphalt plant worker. The Employer states that Philippe Garcia is a recycling employee, who does not perform unit work. The Employer further states that Chris, Domingo, and Wakeen are not employed by the Employer, but are employed by a subcontractor that the Employer occasionally utilizes when it needs additional workers. The Employer provided copies of fund contribution remittance reports covering the period from November 2008, through January 2009. None of these five individuals appear on those reports.³ The Employer states that the Union had not previously raised any issue regarding these employees' names not appearing on these reports.

The Board has consistently held that while the requirements of Excelsior should not be applied mechanically, substantial compliance with those requirements is necessary. See Thrifty Auto Parts Inc., 295 NLRB 1118 (1989). An Excelsior list that omits the names and addresses of a significant number of voters does not constitute substantial compliance. In Thrifty, the Board set aside an election because the employer had omitted the names of 2 voters out of 21 eligible voters, or 9.5 percent of the eligible voters. The Board found that this was not sufficient

³ The individuals included on the remittance reports were included on the Excelsior list provided by the Employer.

compliance with Excelsior, observing that the Board “presumes that an employer’s failure to supply a substantially complete eligibility list has a prejudicial effect on the election.” Id. at 1118; see also Chemical Technology, 214 NLRB 590 ftn. 3 (1974) (finding that an omission rate of 8.3 percent was not sufficient compliance with Excelsior). The Board has held that factors other than the percentage of omissions from an Excelsior list may be relevant in Excelsior cases, such as whether the “omissions involve a determinative number of voters and the employer’s reasons for omitting the names.” Woodman’s Food Markets Inc., 332 NLRB 503, 503 (2000).

In this case, the Union alleges that the Employer omitted five names from an Excelsior list that contained eight names, an omission rate of approximately thirty-eight percent. If these five individuals are employed by the Employer and performing unit work, this omission could require setting the election aside and conducting a second election. In view of the conflicting positions and facts asserted by the parties regarding whether these individuals are unit members, I find that the Union’s objection raises material and substantial issues of fact that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the Union’s objection.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held regarding the Union’s objection.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the Objection.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on February 23, 2009, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Supplemental Decision, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

Dated at Brooklyn, New York, on this 10th day of February, 2009.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201